No. 381.

Supreme Court of the United States

October Term, 1899.

E. M. PATTON,

PLAINTIFF IN ERROR,

VS.

THE TEXAS & PACIFIC RAILWAY COMPANY,

DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR E. M. PATTON, PLAINTIFF IN ERROR.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

E. M. Patton, plaintiff in error, filed in the District Court of El Paso county, Texas, on March 17th, 1893, his petition claiming damages against the Texas & Pacific Railway Company in the sum of twenty thousand dollars for personal injuries. (Printed Trans., pages 2-3). And petition and bond were filed by said rail-

way company for removal, and the case was removed to the United States Circuit Court, W. D. T., at El Paso, Texas. (Trans. Pr., pages 5 to 9) .On April 6, 1898, in the United States Circuit Court, W. D. T., at El Paso, Texas, the plaintiff—Patton—filed his First Amended Original Petition alleging that on December 1st, 1892, he was in the employ of defendant as a fireman on one of its locomotive engines, and that on said date while he was in the discharge of his duties as said fireman and while said engine was stopping near the sand house in El Paso, Texas, to have the fire cleaned out, and while it was moving very slowly, plaintiff attempted to step off said engine, so as to get out of the way of the fire-cleaner, who was about to enter upon said engine to clean out the fire. The step leading from the engine to the cab thereof was in a bad, defective and improper condition and was loose, so that when plaintiff attempted to step from said engine said step, being in such loose condition, turned, so that it threw plaintiff under said engine and caused him to fall, so that his right leg was thrown under said engine, and said engine ran over his right leg and it was bruised and lacerated and his right foot was mashed, and it became necessary to amputate his right leg about three inches above the ankle joint. That said amputation was performed and the plaintiff was confined to his room about two months, and he suffered great pain, etc. That defendant was negligent in not having said step in a good, proper and safe condition, and that in consequence of the negligence and carelessness of the defendant in not keeping said step, and not having same at said time in a good, safe and proper condition, and in having it and allowing it to be in a bad, defective and loose condition, plaintiff sustained the injuries above mentioned, and the

plaintiff was, in no degree, negligent. That at the time defendant knew or ought to have known and could have known by the exercise of reasonable diligence, that said step was in a bad, defective and loose condition, and plaintiff did not know and was not chargable with notice that said step was in such bad condition. That certain repairs were made upon said engine at Toyah, Texas, on November 30th, 1892, and that it was the duty of defendant to have had said engine inspected at Toyah before its return trip to El Paso, Texas, but through the negligence of said defendant said engine was not inspected before its return trip to El Paso, and through the failure of defendant to inspect the same said step was left in a bad, defective, unsafe and loose condition, so that the accident hereinbefore described was caused, and the plaintiff was injured as above mentioned. (Trans. Pr., pages 9-10).

The defendant railway company filed its second amended original answer on April 8th, 1898, setting up certain special exceptions to the plaintiff's petition which were not urged, and a special answer, in which it was admitted that the plaintiff was a fireman upon one of the defendant's engines as stated in his petition, and that at the time stated in his petition plaintiff's duty was to act as fireman on defendant's engine No. 90, which engine was engaged in hauling passenger trains over defendant's road from El Paso to Toyah and from Toyah to El Paso. That at the time the plaintiff was injured he was working about said engine out of the line of his duty, and he voluntarily got upon said engine while the same was in charge of the yardsmen, before the same had been repaired or placed in the round house, and negligently tried to get out of said engine while it was in motion, and thereby, by his own negligence, contributed to the injuries he received. That the

engine was provided with the proper step and defendant kept suitable and competent inspectors who inspected it, and suitable and competent machinists, whose duty it was to repair said engine and who did repair it when necessary. And that said engine was carefully inspected, but inspection failed to discover a defect, if any there was, in said step. And further, that the plaintiff had full opportunity to know the condition of said machinery and apparatus and that he was chargable with equal knowledge of said defect, if any, with the defendant, and that if the plaintiff received the injuries alleged by him, and such injuries were caused by any negligence upon the part of employes of the defendant; that such employes were fellow-servants of the plaintiff. (Trans. Pr., page 11).

The case was tried at the April term, 1898, of the United States Circut Court, W. D. T., at El Paso. The defendant railway company requested the court to instruct the jury, after the evidence was all in, to return a verdict for the defendant, "because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence upon the part of the defendant," which said instruction was given by the court to the jury, and the plaintiff excepted to the court's action before the jury retired and rendered his bill of exceptions and insisted that the court should submit the case to the jury upon the question of negligence raised by the pleadings and evidence, and thereupon the jury returned the verdict which is copied in the judgment of this cause, and the court rendered judgment thereupon against the plaintiff. (Trans. Pr., page 14).

Plaintiff's bill of exceptions was duly prepared and filed on the 12th day of April, 1898. (Trans. Pr. pp. 16-26). On April 13, 1898, the plaintiff in error filed his assignments of errors, with

his petition and bond for writ of error, taking said cause to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, La. (See Trans. Pr. pp. 26-30). And the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans rendered a judgment on March 21, 1899, affirming the judgment of the trial court. (Trans. Pr. p. 30.)

The assignments of error urged by E. M. Patton, plaintiff in error, before said United States Circuit Court of Appeals at New Orleans, are shown on pages 26-27 transcript (print.) and the same embodies and presents the same points substantially as are now urged in our assignments of error before this honorable court.

Our petition for a writ of error, our assignments of error, and our bond for writ of error to the United States Circuit Court of Appeals at New Orleans, were filed on July 26, 1899. (Trans. Pr. pp. 31-34.) Service of citation in error was duly admitted and accepted July 29, 1899. (Trans. Pr. p. 43.)

This honorable court has jurisdiction over this cause, as the defendant railway company was chartered by Act of Congress. There have been two trials of this case. At the first trial judgment for the plaintiff was set aside by the Circuit Court of Appeals April 10, 1894, that honorable court RE-TRYING AN ISSUE OF FACT which had been passed upon by a jury in the trial court, as we have always maintained, in contravention of the seventh amendment to the Constitution of the United States. The opinion by the judges, and the dissenting opinion by Toulmin, D. J. are reported in 61 Fed. Rep. pp. 259-273. A writ of error was taken to this honorable court and dismissed at the October term, 1896, for the reason that the judgment below was not final.

As we have shown, at the second trial, April 12, 1898, the

trial court instructed the jury to return a verdict for the defendant because there is no evidence showing any negligence on the part of the defendant, and the cause being again taken to the United States Circuit Court of Appeals that court affirmed the judgment of the trial court.

We now urge the following specifications and assignments of error:

First: Said United States Circuit Court of Appeals for the Fifth Circuit erred in refusing to sustain the first assignment of error urged by the plaintiff in error and in refusing to hold that the trial court erred to the prejudice of plaintiff in instructing the jury as follows: "To return a verdict for the defendant, because there is not sufficient testimony to entitle the plaintiff to recover and no evidence showing any negligence on the part of defendant." Said instruction was erroneous, as the evidence in the case tended strongly to show that the injury of which the plaintiff complains was the direct result of negligence on the part of the defendant for which it is legally liable, and presented an issue of fact which should have been submitted to the jury. The evidence upon this (second) trial was materially different from the evidence upon the former (first) trial of this case, and the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of defendant's employes at Toyah, in leaving the step attached to the engine in a loose and unsafe condition; that said employes were charged with the duty imposed by law upon the defendant of inspecting the engines and keeping the various parts of and about the same in a reasonably safe and good condition, and that they negligently failed to perform such duty.

Second: The evidence upon the trial tended strongly to show that the step which turned with the plaintiff and caused the injuries which he received through its being loose was in a loose condition when the engine on which the plaintiff was employed left Toyah, and that the engine was not inspected by the defendant's machinist at Toyah, and after repairs were made upon the engine at Toyah the step was negligently left in a loose and unsafe condition.

STATEMENT.

Plaintiff testified that on the day he was injured he had been doing some of his work on the engine at El Paso, and that at this time the engine was moving very slowly, not more than three or four miles an hour, and he, plaintiff, had gotton off of the gangway and was standing with his face to the engine, on the right side of same, with his right foot on the step hereinbefore mentioned, and his left foot on the tender; that the step mentioned was attached by a rod to the rear of the engine, and the plaintiff, desiring to get out of the way of the fire cleaners, as the engine passed the sand house, and for the purpose of stopping there and waiting until the fire was cleaned, had stepped off of the engine in a careful and proper manner, that is, by detaching his left hand and foot from the tender and stepping down on his left foot. That he was on the right side of the engine, which was backing, and the pressure of his right foot turned the step in such a manner as to throw it around close to the rear driving wheel of the engine, and plaintiff's right foot was thrown immediately under the driving wheel and the wheel passed over his right foot and crushed it so that amputation became necessary. The cause of the turning

of the step when plaintiff fell was on account of the nut on the end of the rod, which should have held the step secure and in position, that is, the nut which came down on the top of the casting at the upper end of the rod not being taut, but the same was loose, leaving the rod to which the step was attached so it could be easily turned. (Trans. Pr., p. 19). This engine left El Paso for Toyah November 20, 1892, and on that day this step was taken off at El Paso, and plaintiff assisted the master machinist at El Paso, Mr. Rossiter, in tightening up said nut. The master machinist, Rossiter, and the plaintiff testified that the nut was properly screwed on at El Paso, and would not have become loose in the trip from El Paso to Toyah and return. (Trans. Pr., pp. 17-18). All of the witnesses, excepting A. C. Wheeler, superintendent and foreman of the defendant at El Paso, testified that the nut above described, used to tighten the step, would not work loose in making the trip from El Paso to Toyah and back by the ordinary jarring and running of the engine, but that it might come loose by the step having struck against something. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return. (Trans. Pr., p. 20). It was proven that the nut and threads of the step-rod were in good condition and had not worked loose since the accident to plaintiff. (Trans. Pr., p. 20).

It is the duty of the engineer who operates the engine to inspect and report all defects and repairs necessary on the engine in a book kept for that purpose at each place at the end of his run, and in this instance at El Paso and at Toyah. (Trans. Pr., p. 19). It was the duty of the machinist or foreman not only to do the repairs which are reported as necessary by the engineer, but to inspect the engine itself and to see whether it was in a good con-

dition, so that if the engineer shall overlook anything they might find it. (Trans. Pr., p. 22). The plaintiff, with engine No. 90, and the train to which it was attached, left El Paso, Tex., for Toyah, on November 29, 1892, which was Saturday, and arrived in Toyah on the night of November 29, 1892, at 11:30 p. m. When the train reached Toyah the engineer, Mr. Stiner, reported that repairs were necessary on his engine. The report of the engineer in the book at Toyah provided for that purpose shows that the following repairs were to be made: "Change water; grind in blower; put gasket in front of blow pipe; raise the pilot." To raise the pilot required the engine to be jacked up, and that gibs be put under the spring end of the engine truck. The engine truck is near the front end of the engine. (Trans. Pr., p. 18).

The engineer, Stiner, testified as follows:

Question: Do you know as a matter of fact whether that step was loose when the engine left Toyah?

Answer: No, sir.

Q. Did you examine the step at Toyah?

A. I don't know as I examined it. I got off and on.

Q. Did you examine the step to find out whether or not it was loose?

A. No, sir; I did not pull on it or anything like that,

Q. You don't know whether it was loose when it left Toyah or not?

A. It was not loose when I got on it.

Q. Did you examine it to see whether or not it was loose?

A. I examined it with my foot. Down at Toyah I simply put my foot on the step and got up on the engine. I don't remember the run exactly now. I used the step at the San Martine tank,

or at Prairie and Van Horn. Then again at Blanco and at Hancock, but whether I used it again between Hancock and El Paso I cannot remember.

He explained that he ascertained it was not loose because he got up on the engine, using this step several times, as stated above, between Toyah and El Paso; "and while one might get down from the engine and not discover it, that in mounting the engine after oiling, he came from the front of the engine and grabbed the hand hold and put his LEFT FOOT on this step and swung his body around to place the RIGHT FOOT in the loop on the tender." (Trans. Pr., p. 22).

(The court will allow us to remark here that Stiner was evidently talking about the other step, that is, the step over on the other side of the engine, and not the step which turned and caused the injury to Patton. The court has already realized that the step which turned and caused Patton's injury was on the right side of the engine, and it would be impossible for the engineer, Stiner, to get upon the engine by placing his left foot on the step which turned with Patton and his right foot in the loop on the tender. Stiner's meaning is evident to any one; that is, that he got down from the engine on the right side, which as this court must know, is the engineer's side, went around the engine from the right side, oiling it, and placed his left foot on the step over on the left side, and his right foot in the loop on the tender on the left side in order to get up into the engine on the left side of the engine).

The machinist at Toyah was a man named Young. The machinist should do the work of raising the pilot. It is the foreman's business to see that the machinist did it. (Trans. Pr. pp. 21-22.)

We now call attention particularly to the testimony of the witness Alexander Mitchell. He says: "On the 29th and 30th days of November, 1892, I was the round-house foreman of the Texas & Pacific Railway at Toyah. The company had a machinist at Toyah at that time. He was not at the round-house on Sunday. His name was Charley Young. When he was not there it was my duty to do the work to a certain extent—little jobs." (Trans. Pr., p. 23).

The plaintiff, Patton, also testified that Young, the machinist, was not at Toyah on Sunday, November 30, 1892. (Trans. Pr., p. 21).

We offer the following to show, in a convenient way, the contrast between the testimony of Alexander Mitchel on the second trial in April, 1898, and his testimony given on the first trial of this case:

The references are to the printed transcript:

MITCHELL'S TESTIMOMY.

ON FIRST TRIAL.	ON SECOND TRIAL.
The step was not taken off at Toyah. (Trans. p. 25). The nut on the step was not moved while the engine was at Toyah on that trip. (Trans. p. 25.) I found that I could not raise the pilot with the force at hand by myself, so I did not raise the pilot. (Trans. p. 25.) I did put the gasket in the pipe. (Trans. p. 25.) I did grind in the blower. (Trans. p. 25.) The jack-screw near the step was not placed under the engine in a position to elevate it. (Trans. p. 25.)	The step was taken off at Toyah. (Trans. p. 23.) I had to remove the nut in order to get the step off. (Trans. p. 24.) I raised the pilot and in order to do that I had the step off and jacks under it. (Trans. p. 23.) I did not put the gasket in the pipe. (Trans. p. 24.) I did not grind in the blower. (Trans. pp. 24-25.) In order to raise the pilot I put the jack screws under the end of the engine where the step was. (Trans. p. 25).

The witness, Mitchell, said that he had no recollection of testifying to anything that appears in the above left hand column, on the first trial of this case. (Trans. Pr. p. 25). The record shows that on the first trial this witness, Mitchell, testified that "to raise the pilot required the witness to jack up the engine and put gibs under the spring end of the engine. That the witness did not do this because it was a pretty big job and he was doing the work by himself with the help of only two Chinamen. That the engine was all right and ran as well as if it had been done, except the pilot was a little low." (Trans. Pr. pp. 25-26).

On the second trial said witness testified as follows:

Question: State what you did about the engine.

Answer: I put some clips or gibs under the springs to raise the pilot up.

Q. Did you complete the job?

A. I did.

Q. Did you do anything with the part of the engine near the engine step, on the right side?

A. In order to do that I had the steps off and jacks under it.

Q. Did you have anything to do with the step?

A. I had it off.

Q. Did you put it back there?

A. Yes, sir.

Q. Did you put it back properly?

A. Yes, sir; I had men working with me to do it.

Q. Did you see it done?

A. I seen it being done. I went into the office and came out again.

Q. Did you examine the nut to see if it was put on right or not?

A. The nut was screwed up tight. It made 200 miles. (Trans. Pr. p. 23).

On cross-examination he testified as follows:

Q. Were you a machinist then Mr. Mitchell?

A. No, sir, I aint no machinist, that is, I never learned the trade.

Q. That was a machinist's work you were trying to do wasn't it?

A. Well, yes, it was a machinist's work, although I can do it. (Trans. Pr. p. 25.)

The plaintiff, Patton, testified that he never used the step after he left Toyah until he arrived at El Paso. He thinks he only got off the engine once between Toyah and El Paso and that was at Sierra Blanca for breakfast, and that he got off on the left side. (Trans. Pr. p. 21.) He did not know the said step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured. (Trans. Pr. p. 20.) It was proved without controversy that the manner in which the plaintiff got off the engine backward was a careful and prudent manner and in the usual manner of alighting from an engine whether in motion or standing still, and if said step had been in repair there was no danger in the manner in which the plaintiff alighted from the engine. (Trans. p. 20.) And it was proved that the plaintiff, Patton, was acting in the line of his duty and was in the discharge of his duty at the time the accident happened and he was injured. (Trans. Pr. p. 20).

In view of the foregoing testimony, we offer the following propositions of law.

First: If upon any construction which the jury is authorized to put upon the evidence, or any inference they can draw from the evidence, the conclusion of negligence can be justified, the question of negligence must be left to the jury. Sioux City & Pac. Ry. Co., vs. Stout, 17 Wallace, 657. Weightman vs. Washington, 1 Black p. 39. Holladay vs. Kennard, 12 Wallace, 254. Randall vs. B. & O. Ry. Co., 109 U. S. 478.

The following authorities are all to the effect that the question of negligence must be submitted to the jury, and this includes not only cases where the facts are in dispute, but also where the question is as to the inference to be drawn from such facts after they have been determined. And they hold that the question of negligence must be submitted to the jury in cases where there may be a fair difference of opinion as to whether the inference of negligence should be drawn.

Dunlap vs. Railway Co., 130 U. S. 652.

Railroad Company vs. Powers, 149 U. S. 44.

Grand Trunk Ry. Co. vs. Ives, 144 U. S. 408.

Wash. & G. Ry. Co. vs. Tobriener, 147 U. S. 571.

Railway Co. vs. Converse, 139 U. S. 469.

We call particular attention to the case of Patton vs. Southern Ry. Co., 82 Fed. Rep. 979, which was tried before Chief Justice Fuller, Goff, Circuit Judge, and Brawley, District Judge. In this case the court says: "In all actions founded on negligence,

whenever the facts are in dispute or conflicting, or the credibility of witnesses is involved, or the preponderance of testimony, and wherever the facts admitted or not denied are such that fair-minded men might draw different inferences from them, it is a case for a jury, and a case should not be withdrawn from the jury unless the inferences from the facts are so plain as to be a legal conclusion."

We insist that the case at bar is identical in all of its material features with the case of Railway Co. vs. Daniels, 152 U. S. p. 684, and in that case the Honorable Supreme Court laid down the identical rule for which we are here contending, and applied the same so clearly to similar facts that there can be no excuse hereafter for any one's failing to understand it.

Second. The undisputed testimony shows that a defect existed about the engine of defendant, and that while the plaintiff was engaged upon the same he was injured. And this defect was of such a character as raised a reasonable presumption of negligence on the part of some one connected with the defendant's business, and for whose negligence it is liable to the plaintiff.

In Jensen vs. The Joseph B. Thomas, 81 Fed. Rep. 578, it appears that the plaintiff was a stevedore and was working in the lower hold of the vessel under the forward hatch. The hatch covers had been taken off and piled one on top of the other very close to the hatchway. A keg that had been freshly painted was placed on these covers to dry. The keg belonged to the vessel, and in some way, or by some one, the evidence not disclosing how or by whom, the keg was knocked over and fell down the hatchway,

injuring the plaintiff. It was held that negligence would be implied and a judgment for the plaintiff was affirmed. This case cites many others which hold with it that the doctrine of implied negligence obtains in master and servant cases as well as in others. See as directly in print:

Carroll vs. C. B. & N. R. Co., 75 N. W. p. 176.

Cummings, vs. Furniture Co., 18 N. W. p. 742.

We invite this honorable court's attention especially to the case of Houston vs. Brush, 29 Atlantic Rep. 380, where the plaintiff was a servant of the defendant, who furnished a derrick for the plaintiff to use in their work, in which he was engaged; while he was thus using it he was injured without his fault, by the falling of the wheel from the tackle-block attached to the top of the mast of the derrick. This block had two wheels in it, which were fastened in by a steel pin passing through the block; one end of the pin had a square head, which by means of a mortice, was sunk into the upper side of the block so that it was flush with it, and the other end of the pin was flush with the other side of the block. When the block came from the shop where it was manufactured a small piece of tin was tacked on over the square head of the pin to keep it from working out. The plaintiff's evidence tended to show that on the day of the accident this tin had come off and the pin had worked out far enough to let the wheel out and it fell and injured him. The defendant requested the court to give the following instruction to the jury, viz: "The mere fact that the pin came out of the block is not sufficient to authorize any inference or presumption that the defendant failed to exercise ordinary care." This instruction was refused by the trial court, and the ruling sustained. The case is from the supreme court of Vermont; and the

court says: "Without attempting to formulate a rule embracing every case to which the maxim is to be applied, we think it is clear from the authorities cited that when the defendant owes a duty to the plaintiff to use a certain degree of care in respect to the thing causing the accident, to prevent the occurrence of such accident, and the thing is shown to be under the management of the defendant or his servants, and the accident in such case as in the ordinary course of things does not occur if those who have the management use proper care, it affords evidence, in the absence of evidence showing that it happened without the fault of the defendant, that the accident arose from the lack of the requisite care. In such a case the occurrence itself, unexplained, shows prima facia a shortage of duty on the part of the defendant." The court says further: "The doctrine of res ipso loquitur has been more frequently invoked and applied in actions against carriers of passengers than in any other class of cases. An attempt has been made by some law writers to limit the application of the rule to cases growing out of the contractuai relation, but there seems to be no reason for such a limitation." Mr. Wood, in Sec. 389, of his work on Master and Servant, says: "It is not necessary that the servant should do more than to raise a reasonable presumption of negligence or fault on the defendant's part. Therefore, if a defect is shown to exist, and the accident results while the servant is engaged upon such defective machinery, in the absence of proof as to the manner in which the injury was inflicted negligence may be inferred by the jury."

In Greenleaf vs. I. C. Ry. Co., 29 Iowa, I4, (s. c. 4 Am. Rep. 181) which was a case between master and servant, it was held that the plaintiff is not bound to raise by his proof more than a

reasonable presumption of negligence on the part of the defendant.

In the case of Ross vs. Stevens and the Conduit Transfer Co., (11 Fed. Rep. p. 438) the court says: "It is contended, however, that it was error to instruct the jury that they may infer such negligence from the fact of the explosion of the boiler, and it is argued that such presumption only obtains when the defendant is under a contractual obligation to the plaintiff, as in the case of a common carrier or bailee. Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in justice or reason for any such a limitation of the rule of evidence. The presumption originates from the nature of the act and not from the nature of the relationship between the parties. It is indulged as a legitimate inference whenever the occurrence is such as in the ordinary course of things does not take place when proper care is exercised."

In Shearman vs. Redfield on Negligence, Vol. 1, Sec. 58, it is said that the plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and resulting injury to himself. Having done this, he is entitled to recover unless the defendant produces evidence sufficient to rebut this presumption. It has been sometimes held not sufficient for the plaintiff to establish a probability of the defendant's fault, but this is going too far. If the facts proved make it probable that the defendant violated his duty, it is for the jury to decide whether he did so or not. To hold otherwise would be to deny the value of circumstantial evidence.

In the case of McRay vs. G. H. & S. A. Railway Co., 98 Texas, p. 168 (S. W. Rep. Vol. 34, p. 95), it appears that a brake-

man was killed by a steel rail falling from a train upon which he was at work. One end of the rail struck the ground and the other end resting on the side of the car swept the whole north side of the train and struck McRay, who was sitting on the north side of the car, killing him instantly. The supreme court of Texas made the following quotation which it fully endorsed, and added that it was amply sustained by the authorities, both English and American, viz:

"There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

All of the cases to which we have referred simply emphasize a rule laid down by the supreme court of the United States many years ago, in the case of Stokes vs. Saltonstall 13 Peters (U. S.) p. 181.

Third: The evidence shows that it was the duty of the engineer to inspect the engine at Toyah, and at stations between Toyah and El Paso, and to report defects, etc. In so far as his duty to inspect the engine was concerned, he was not a fellow servant with the plaintiff. When this case was before the U. S. Circuit Court of Appeals the first time it used the following language: "It may not have been the duty of the fireman to inspect this step, but it

was the duty of the engineer, and they were fellow servants." (See Fed. Rep. Vol. 61, p. 295.)

In the case of A., T. & S. F. Ry. Co., vs. Mulligan, 67 Fed. Rep, 569, Justice Wood, delivering the opinion of the court says: "A locomotive engineer charged with the duty of inspecting his engine is not, in respect to the duty of such inspection a fellow servant of a hostler or helper engaged in switching engines in the railroad yard." And the case of B. & O. Ry. Co., vs. Baugh, 149 U. S. 368, is cited in support of the proposition, and by examination of the Baugh case it will be seen that it does support it fully.

In the Baugh case the United States Supreme Court says: "Therefore it will be seen that the question turns rather on the character of the act than on relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master.

In the case of Coontz vs. M. P. Railway Co., 26 S. W. Rep. 661, the supreme court of Missouri holds that an engineer whose duty it was to inspect his engine was not as to such act the fellow servant of the conductor in charge of the same train; that, as to the matter of inspection the engineer represents the company, and his neglect to inspect his engine properly was the negligence of the company. This case cites many others in support of the holding, and among them the case of Railway Company vs. Herbert, 116 U. S. 642, which fully sustains the holding.

In the case of Sabine & E. T. Ry. Co., vs. Ewing, 21 S. W. Rep. p. 700, the court of civil appeals of Texas holds as follows: "The fireman on a locomotive, injured because of a defect in the coupling between the locomotive and tender is not precluded from

recovering from the company because the engineer was negligent in failing to inspect the coupling. This being the duty of the company such negligence of the engineer is its negligence and not the negligence of a fellow servant."

In Railway Co., vs. Herbert 116 U. S. 642, the supreme court of the United States holds, "That as an obligation rests on the master to furnish suitable machinery and to keep the same in repair, he is responsible for the negligence of those persons in his service on whom he has devolved the duty of inspecting the machinery and the appliances and seeing that they are kept in a proper condition for use." The same doctrine is announced in King vs. Railway Co., 14 Fed. Rep. 277, and Carpenter vs. Railroad Co., 39 Fed. Rep. 315; Little Rock & M. Co., vs. Mosely, 56, Fed. Rep. 1009. This last case also cites the Baugh case, 149 U. S. 368 as sustaining the same doctrine and the law of the case at bar is well stated in the case of Huff vs. Railway Co., I00 U. S. 213.

In the case of Van Dusen vs. Letellier, 44 Northwestern, Rep. 572 the supreme court of Michigan, speaking of the duty of a master to inspect and keep machinery and appliances in good order, says: "If he can not do this himself personally he must provide some other person to take his place, in this respect, and the person to whom the master's duty is thus delegated, no matter what his rank or grade, no matter by what name he may be designated, can not be a servant in the sense or under the rule applicable to injuries occasioned by fellow servants. Such person is an agent, and the rules of law applicable to principals and agents must apply. In order to keep the machinery and appliances safely in repair, the law makes it the duty of the master to make all needed inspections

and examinations, and he can not escape responsibility by delegating this duty to one who in other respects may be a fellow servant of the person injured by the failure to properly perform his duty." And in support of this doctrine, in the case mentioned, the Supreme Court of Michigan cites a large number of cases, and among them the case of Railway Co., vs. Herbert, 116 U. S. p. 642. In an opinion rendered by Judge Shiras the U. S. Circuit Court D. Minn., holds that engineers and firemen in such a case are not fellow servants, 42. Fed. Rep. p. 383.

In the case of T. & N. O. Ry. Co. vs. Bingle, 41 S. W. Rep. 90, the Court of Civil Appeals of Texas holds that an engineer whose duty it was to inspect and report defects in his engine is not a fellow servant of the fireman.

In the case of Nall vs. L. N. A. & C. Ry. Co., 38 Northeastern Rep. 183, the supreme court of Indiana, in speaking of the rule for determining who are fellow servants, says: "This must be determined not from the title given him, or from his rank in the master's service, but from the character of the duties imposed upon him, and which he was performing when deceased was killed. The law imposes certain duties upon the master, the performance of which he can not delegate to an agent so that he can not escape responsibility. Whether the master assumes to discharge these dutes in person or entrust them to another, he is in either case the actor. The agent to whom he entrusts such duty, regardless of his rank, acts as the master and in his place."

The following Federal cases all hold that the employe whose duty it is to inspect machinery is not a fellow servant with those who are using it. King vs. Ohio & M. Ry. Co., 14 Fed. Rep. 277. Little Rock & M. Ry. Co. vs. Mosely, 56 Fed. Rep.

1009. Northern Pac. Ry. Co. vs. Herbert, 116 U. S. 642. Huff vs. T. & P. Ry. Co., 100 U. S. 213. Carpenter vs. Mexican National Ry. Co., 39 Fed. Rep. 315. B. & O. Ry. Co. vs. Baugh, 149 U. S., p. 368.

Fourth: In view of the testimony of the witness Alexander Mitchell, the case should have been submitted to the jury, because his credibility as a witness was directly in issue, and the plaintiff had the right to have the jury determine that fact, and as his was the only evidence that the step was put back properly after it was taken off at Toyah by the Chinamen, the question of his veracity became an important one.

In the case of Robinson vs. N. Y. C. & H. R. Ry., 9 Fed. Rep. 877, the court says: "Where the testimony to rebut the presumption of negligence proceeds from persons who would be guilty of a criminal fault unless they VINDICATED themselves from such presumption, a question of credibility is presented for the jury."

In Chicago G. W. Ry. Co. vs. Price, 97 Fed Rep., p. 432, the United States Circuit Court of Appeals for the Eigth Circuit said, where a witness had changed his testimony and made two contradictory statements:

"Both of these statements were not true, and if he testified falsely on one material issue the jury and the court were permitted to disbelieve his testimony upon the other. The credibility of such a witness and the effect that should be given to his testimony were questions peculiarly within the province of the jury."

In the case of London vs. W. U. Tel. Co., 45 N. Y. 549, the

court says: "From the necessity of the case, all such evidence as theirs to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as an admission would subject him or her to severe responsibility for the consequences. This is the controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that THEIR RELATION TO THE SUBJECT MATTER IN CONTROVERSY WAS OF ITSELF SUFFICIENT to take from the court the right to dispose of the case upon their evidence, and to require that the jury should pass upon the weight to be given to their statement."

In the case of Wohlfahart vs. Becker, 92 N. Y. 489, the court says: "Where, however, in such case, the only evidence that such warning was given was that of the druggist's clerk who sold the poison as the jury was at liberty to disbelieve him, he being an interested person, having violated the law by omitting the label, held that the question as to whether the warning was given, was one for the jury, and it was error to direct a verdict for the defendant."

In the case of Gildersleeve vs. London, 23 N. Y. 609, the court says: "Where the credibility of a witness is impeached, his testimony cannot be taken as conclusive, although uncontradicted, and the question of fact as to the weight his testimony is given must be submitted to the jury." In the same case it is held that where the witness is interested in the question, although he is not directly impeached, and his testimony is uncontradicted, his credibility is a question for jury, and the court is not warranted in directing a verdict upon his testimony alone.

In the case of Dorsey vs. Town of Phillips, 22 Federal Reporter 634, the court says: "Where there is some intrinsic improbability in the witness' narrative, or he has shown himself unworthy of credit BY HIS ATTEMPT TO FALSIFY THE TRANSACTION, the question of fact should be submitted to the jury."

As we have heretofore shown in this brief, the witness Alexander Mitchell either swore falsely on the first trial of this case or on the last trial. By an inspection of the opinion of the court rendered when the case was first taken up (See Fed. Rep., Vol. 61, 259), it will be seen that the court's judgment was based largely upon the positive direct statements of the witness Alexander Mitchell, which statements were directly and flatly contradicted by him on the last trial. We are thoroughly satisfied that the court would not have reversed and remanded the case on the first hearing if there had been presented to the court such an array of facts as are now presented by the record; and we think that the testimony now shows conclusively that after the Chinamen took off the step and raised the rear end of the engine with the jack-screw at Toyah, when they put it back they left it in a loose and dangerous condition; and we say furthermore that it is plain that neither Mitchell nor any other person inspected or examined the engine afterward. To our minds, Mitchell's own contradictory and evasive statements show clearly that he is conscious of

the fact that he did not perform his duty, in so far as he had any duty to perform in the premises. He confesses that he is not a machinist, and that it was the machinist's duty to inspect the engine at Toyah before its return to El Paso. And we say that it is clear that no one inspected it, and that on account of the fact that the step was left in a loose and dangerous condition the plaintiff in this case lost his right leg.

Fifth; It cannot be said that the evidence of the engineer Stiner would justify the trial court in taking the case from the jury, because he does not testify that he made any proper inspection of the step. His statement respecting the matter amounts simply to the assertion THAT HE USED THE STEP IN GETTING UP INTO THE ENGINE, and did not discover when he stepped upon it that it was loose. Even if the mere stepping upon the step by Stiner is to be regarded as an inspection in any sense, the sufficiency of such inspection was a question of fact for the jury to determine, and they had the right to determine it from all the facts in the case.

In the case of C. C. C. & St. L. Ry. Co. vs. Ward, 46 Northeastern 462, the supreme court of Indiana says: "To excuse the master from liability to the servant resulting from defective machinery on the ground that the machinery had been inspected, it

must appear not only that the inspector was competent, but also that the inspection was a reasonably careful one."

In the case of Sheedy vs. C. M. & St. P. Ry. Co., 57 Northwestern 60, the supreme court of Minnesota, in the case of the loosening of a nut, and a case almost identical in its features with the case at bar, says: "The question as to whether or not the fact that the nut had worked back on the bolt could have been discovered by a reasonably careful inspection, was for the jury to determine, and that an examination of the nut and bolt to discover whether the same were apparently in good order was within the duty of the proper car inspector while the car was in route." The court further says: "Of course, all the inspection required is to see whether the bolt is securely fastened in its place, and this falls within the ordinary duties of the inspector of cars while en route."

The case of Bailey vs. R. W. & O. Ry. Co., 34 N. E. Rep. 318 (from New York) is a case where the pin in the bottom of a brake rod worked loose, and when the brakeman attempted to use the brake he was injured. The absence of the pin could not be seen by one working the brake, but an inspection of the brake under the car would have disclosed its absence." Held, that it was for the jury to determine whether or not it was negligence in the defendant not to have discovered the absence of the pin, and it was error to direct a verdict for the defendant.

In the case of G. H. & S. A. Ry. Co. vs. Templeton, 25 Southw. Rep. 135 (Texas), the Court of Civil Appeals of Texas, (the facts being almost identical with those in the case last

cited) held that the plaintiff was entitled to recover, and a rehearing was refused by the supreme court of Texas.

In the case of Railroad Company vs. Ives, 144 U. S. p. 409, the court said: "It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court." And in Gardner vs. Mich. Cen. Ry. Co., 150 U. S. 361, substantially the same language is used and the same idea has been repeatedly and forcibly expressed by this court.

As has been well said by Justice Coldwell of the Eighth Circuit, "The opinion of even a majority of the court does not express the conclusion all reasonable men, or any considerable number of such men, would draw from the evidence in the case. Neither a majority nor a minority of the appellate court is empowered to decide questions of fact. The constitutional mode of ascertaining the sense of reasonable men on disputed questions of fact in common law actions is by the verdict of twelve jurymen and not by the opinions of the judges. It was because the people knew the judges were poor judges of the facts that they committed their decisions to a jury, and every day's experience confirms the wisdom of their action. The plaintiff has a constitutional right to have the facts of his case tried by a jury." And in the case of Railway Co., vs. Stout, 17 Wallace 657, the Supreme Court of the United States said, many years ago: "Even if the facts are undisputed it is for the jury and not for the judges to determine whether proper care was given or whether they established negligence."

In conclusion we desire to emphasize the following points:

In the first place, there is not a particle of evidence about Patton's ever having used this step which proved to be in a bad

and dangerous condition, on a single occasion after the engine left Toyah on the El Paso run. We proved on the trial, as the bill of exceptions shows, that the step which turned was several inches lower than that on Patton's left side, and if there is any presumption about the matter it would be that as the engine was standing still on all occasions when Patton got off of it on the run from Toyah, he did not use the lower step or the defective step at all. The step or loop which was on the tender was on the left side of Patton, or the engineer or any one else getting out of the gangway backwards, alighting in the proper way from the engine, and this loop was about six inches higher than the step which was loose, and a man would place his left foot in the loop and naturally would very seldom use the step on the right side at all in the mere act of getting on or off the engine, and as the step projected directly toward the outside and away from the engine, a man might step onto or off of the engine without ever detecting that it was loose, and the only way in which the fact that it was loose could have been ascertained was by an INSPECTION of it or by pressure being brought to bear latterally upon it.

Again, it was just as much the business of the machinist at Toyah to inspect the engine, as it was the business of the machinist at El Paso to inspect it, and it was just as much the duty of the company to inspect the engine at Toyah before its return as it was the duty of the company to inspect the engine at El Paso. There is no testimony whatever that the machinist whose business it was to inspect the engine at Toyah, after the run of 196 miles from El Paso ever inspected it at all, and there is no testimony whatever that anybody ever inspected it at Toyah.

It was at no time and nowhere admitted in the case, and

there is nothing whatever in the bill of exceptions to indicate, that the foreman Mitchell and the other employes of the railway company at Toyah were either competent or made any effort to discharge their duty. On the contrary it is shown positively by Mitchell's own testimony that he was incompetent and an unfit man for the place he held. He himself testifies as we have shown that he was trying to perform the machinists duty, because he believed he could do it, and he said on the first trial that he gave up the work and failed to do the most important thing the engineer had directed to be done, that is, to raise the pilot, because, as he says, he had only two Chinamen to help him and he "let it go."

We insist that in the light of the evidence it was a physical impossibility for the step to have become loose as it was with the application of some manual force brought to bear upon the threads of the nut or the threads of the step rod which should have fastened and held the step-rod securely. This court will take judicial knowledge of the fact that a screw or a nut turns from left to right, and locating the step, the step-rod, the nut, the engine, the tender and Patton correctly, we must see that it would have been utterly impossible for the step to have turned toward the right and thrown Patton's leg under the driving wheel which was only a few inches to Patton's right in front of the step, unless the step had already been turned or the nut left so as to allow at least a full revolution. Unless the rod and the step had already been turned all the way around at least once or the nut had been turned so as to allow a revolution any pressure of Patton's right foot upon the step as he was standing would only have made the step tighter, if possible.

If we understand the decisions of the Honorable Supreme

Court of the United States to which we have hereinbefore referred, they are to the effect that if the step which was so loose that it could be easily turned, (and through the looseness of which Patton was injured) became and was loose, or was allowed to be loose through any negligent act or want of any act upon the part of the highest or the humblest servant of the defendant below, whose duty it was to see that the same was left in a secure and safe condition, then the defendant below is liable.

We submit most earnestly that the evidence introduced on the trial of this cause before the jury might in all reason have satisfied the jury that a machinist or an engineer or some other employe was negligent, or that the company was negligent in not having the engine inspected at Toyah, or was guilty of negligence in many ways, else the step could not have been in the condition in which it was. And we insist upon the rule as laid down by the honorable Supreme Court of the United States in the case of Texas & Pacific Railway Co. vs. Archibald, 170 U. S., p. 665, "that an employe of a railroad company has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection."

We respectfully ask that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit and of the trial court be reversed and the caused remanded.

MILLARD PATTERSON,
FRANK W. HACKETT,
Attorneys for E. M. Patton, Plaintiff in Error.